STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 10, 2012
v	No. 299747 Montmorency Circuit Court
ROBERT SCOTT THOMAS, Defendant-Appellant.	LC No. 09-002322-FH

Before: MURPHY, C.J., and FITZGERALD and METER, JJ.

PER CURIAM.

A jury convicted defendant of possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(v), resisting and obstructing a police officer, MCL 750.81d(1), and possession of marijuana, MCL 333.7403(2)(d). The trial court sentenced defendant to a prison term of 23 months to 4 years for the heroin possession conviction and to a jail term of 205 days for the resisting and obstructing and marijuana possession convictions. Defendant appeals as of right. We affirm.

On August 13, 2009, Andrea Ettinger informed personnel at the Michigan State Police Department in Lewiston, Michigan, that defendant was at a house rented by his girlfriend, Cassie Troyer. Troopers went to the residence to enforce an outstanding felony warrant on defendant. One of the responding troopers testified that defendant ran from them when they arrived, refused to comply with numerous lawful police commands, hid from the officers in a darkened garage, "clenched up" his body to prevent an officer from handcuffing him, and repeatedly lied about his name. After defendant was apprehended, he was escorted to a bedroom to retrieve his shoes and pants. Troopers found marijuana and heroin in that bedroom. Defendant testified that the heroin belonged to Ettinger.

Defendant first contends that he was deprived of a fair trial by the prosecution's failure to produce Ettinger, an endorsed witness, at trial and because counsel was ineffective for failing to object. We disagree. Because defendant did not object to the prosecution's failure to produce Ettinger, or request a due diligence hearing, this issue is not preserved. Accordingly, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

MCL 767.40a does not require the prosecution to produce all known witnesses for trial, but only to reveal known res gestae witnesses and produce those witnesses named on the witness

list. See *People v Perez*, 469 Mich 415, 418-419; 670 NW2d 655 (2003). A prosecutor who endorses a witnesses under MCL 767.40a(3) is required to exercise due diligence to produce that witness for trial. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). If a witness is named on the prosecution's witness list under MCL 767.40a(3), the prosecutor has a duty to produce that witness for trial, unless relieved of that duty for good cause. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). Where the prosecution fails to secure the presence of an endorsed witness without proper excuse, an instruction based on CJI2d 5.12 may be appropriate. *Perez*, 469 Mich at 420. Whether CJI2d 5.12 is appropriate depends on the facts of each particular case. *Id*.

Because defendant did not request Ettinger's presence at trial, or object to the prosecution's failure to produce Ettinger, a due diligence hearing was not held.[1] Accordingly, defendant must demonstrate that the failure to produce Ettinger was a plain error. A "plain error" is one that is "clear or obvious." *Carines*, 460 Mich at 763. Here, the reasons for not producing Ettinger are not apparent from the record and, therefore, it is not clear or obvious that the prosecution failed to exercise due diligence to attempt to produce Ettinger for trial.[2] Thus, it is not clear that good cause for failing to produce Ettinger was lacking. And without a clear showing that good cause for deleting Ettinger from the witness list did not exist, an instruction based on CJI2d 5.12 was not appropriate. Moreover, defendant has not offered any "explanation of how [Ettinger's] testimony would have been favorable and material" to him. *United States v Valenzuela-Bernal*, 458 US 858, 872; 102 S Ct 3440; 73 L Ed 2d 1193 (1982). He merely asserts that confronting Ettinger was "crucial" to his defense that the heroin belonged to Ettinger. Accordingly, no basis exists for concluding that defendant was prejudiced by the absence of this witness.

Similarly, we reject defendant's related, and unpreserved, argument that counsel was ineffective by failing to demand that the prosecution produce Ettinger or to demand assistance from the prosecution to locate her. Counsel's strategic decision not to call a witness constitutes ineffective assistance only if it deprives the defendant of a substantial defense, which is a defense that might have made a difference in the outcome of the trial. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant fails to show that counsel's failure to take steps to call Ettinger as a witness deprived him of a substantial defense. He was still able to assert at trial that the heroin belonged to Ettinger. And, given that it is reasonable to presume that Ettinger's testimony would not be favorable to defendant, counsel's decision not to pursue having her

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[1] On appeal, defendant asserts that Ettinger was a material witness because the heroin found in the bedroom belonged to Ettinger, not to defendant. However, because defendant never requested Ettinger's production, her materiality to the defense was never addressed. Presumably, the prosecutor endorsed Ettinger as a witness for the limited purpose of establishing how the police learned of defendant's whereabouts in order to serve him with an outstanding felony warrant. This information, however, was not relevant to the present charges against defendant.

[2] The prosecutor stated on the morning of trial that she might call Ettinger as a witness. Consequently, it is probable that the prosecutor had subpoenaed Ettinger.

appear meant that he was able to accuse her of possessing the heroin without her contradictory testimony.

Defendant also asserts that counsel was ineffective for failing to request a due diligence hearing in regard to Ettinger. We have already concluded that defendant was not prejudiced by Ettinger's absence, and, accordingly, defendant also cannot establish that he was prejudiced by counsel's failure to request a due diligence hearing. Moreover, even if a request for a due diligence hearing had resulted in Ettinger being produced as a witness, defendant has not shown that the trial's outcome would not have been different. Once again, Ettinger was likely to provide unfavorable testimony, and defendant has not offered any evidence to the contrary, nor has he shown that confronting her presumed denials of possession would have resulted in a different verdict.

Defendant also argues that his counsel was ineffective for failing to request CJI2d 5.12, Because defendant neither requested Ettinger's presence at trial nor objected to the prosecution's failure to produce Ettinger, a due diligence hearing was not held and there is no explanation in the record for the failure to produce her. As previously noted, there is no clear basis for concluding that good cause for failing to produce Ettinger was lacking. And without a clear showing that good cause for deleting Ettinger from the witness list did not exist, an instruction based on CJI2d 5.12 was not appropriate.

Finally, we reject defendant's assertion that the trial court erred in refusing his request for an instruction on attempted resisting and obstructing. A person commits the offense of resisting and obstructing an officer when he or she "assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties." MCL 750.81d(1). Obstruct is defined as "the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command." MCL 750.81d(7)(a). A person who does any act toward the commission of an offense with the intent to commit that offense, but who fails in the perpetration or is prevented from executing the offense, is guilty of the offense of attempt. MCL 750.92. Thus, "an 'attempt' consists of (1) an attempt to commit an offense prohibited by law, and (2) any act towards the commission of the intended offense." *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001).

An attempt instruction was not appropriate here because a rational view of the evidence would not support a finding that defendant merely intended to resist and obstruct and took some step in furtherance of that intent, but failed or was otherwise prevented from completing the offense. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). Defendant argues that because he only admitted to one act of resistance, hiding in the garage, and he ultimately failed to avoid arrest, the jury could have found that hiding in the garage was only a substantial step toward resisting and obstructing an officer. However, defendant's act of hiding from the police when he knew they were there to arrest him hindered the trooper's performance of their lawful duties, and could reasonably be considered an act of resistance or opposition, both of which are forbidden under MCL 750.81d(1).

Further, the evidence tended to show that he engaged in both noncompliance and physical resistance. A trooper testified that defendant ran from the police when they first arrived at Troyer's home, refused to comply with the officer's numerous lawful commands, "clenched up"

his body to prevent the officer from handcuffing him, and repeatedly lied about his name. The trooper also testified that someone pulled back on the door to the garage when he tried to open it. "I was playing tug of war with the door," the officer testified. There was no evidence of anyone other than defendant being in the garage at the time. Therefore, the trial court did not err when it denied defendant's request for an instruction on attempted resisting and obstructing because no rational view of the evidence supported it.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter